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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Application by Verizon New Jersey)
Inc., Bell Atlantic Communications,)
Inc. (d/b/a Verizon Long Distance),)
NYNEX Long Distance company)
(d/b/a Verizon Enterprise Solutions),)
Verizon Global Networks Inc., and)
Verizon Select Services Inc., for)
Authorization To Provide In-Region,)
InterLATA Services in New Jersey)

CC Docket No. 01-347

**REPLY COMMENTS ON BEHALF OF THE
NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE
IN OPPOSITION TO THE APPLICATION OF
VERIZON NEW JERSEY FOR AUTHORIZATION TO PROVIDE
IN-REGION, INTERLATA SERVICES IN NEW JERSEY**

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SUMMARY

The record before the Commission establishes that now is not the time for Verizon-NJ to receive in-region, interLATA authority. Because of the universally recognized absence of competition in residential services, such a grant would not be in the public interest. Moreover, Verizon-NJ has failed to satisfy its Track A burden and at least item 2 of section 271's competitive checklist.

After the recent D.C. Circuit decision concerning the Commission's Kansas/Oklahoma 271 order, there can be no doubt that in every such proceeding the Commission must specifically evaluate whether granting section 271 authority is in the public interest. That public interest evaluation must transcend the analyses of Track A and competitive checklist compliance, and focus on actual competitive conditions in the state. As the Commission itself has held, moreover, it must take into account local, residential competition in all geographic areas of the state. That question is determinative here.

The absence of significant local competition is established by virtually all the evidence provided in this proceeding, including the evaluations of the Department of Justice and the New Jersey Board of Public Utilities. The Department of Justice, which chose not to directly address this important subject, nevertheless corroborated the conclusions of Commenters with statements on the dismal state of residential competition. The Commission must give serious consideration, moreover, to the evidence of various Commenters that competition will suffer because they and other competitors will face a debilitating price squeeze. Finally, the lack of firm and final UNE rates will severely retard competitive entry, because it will diminish the willingness of already skittish investors to provide the capital needed for entry and expansion.

Because there is no local competition in New Jersey, granting Verizon-NJ's application would not be in the public interest.

Furthermore, Verizon-NJ has not satisfied the Track A requirements of 47 U.S.C. § 271(c)(1)(A). Specifically, Verizon-NJ has demonstrated less than a *de minimis* level of facilities-based, residential local exchange competition. If the Commission's prior statements on Track A are to mean anything, it must find Verizon-NJ's showing on this requirement deficient.

Verizon-NJ's application also falls short because it does not satisfy checklist item 2, which requires that the BOC establish non-discriminatory access to unbundled network elements ("UNEs"). First, the evidence shows that Verizon-NJ's OSS are flawed in their current form, and Verizon-NJ has failed to show that these systems are sufficient to support the commercial usage volumes of a competitive market. The testing of these systems by KPMG cannot hide these deficiencies, and KPMG's failure to detect deficiencies in the test data that Verizon-NJ provided calls into question the accuracy of its conclusions.

Second, Verizon-NJ has not shown that it is providing UNEs at cost-based rates as required. The Board has issued a non-final Summary Order purporting to establish rates, but there is no confirmation that Verizon-NJ has yet implemented those rates. Without a final order establishing UNE rates and explaining the basis for those rates, the Commission has no basis to assess whether the Board has set out TELRIC-compliant rates. When a final order does issue, moreover, it will be subject to appeal; therefore, even the rates in that order could not be deemed final in any sense that is meaningful in terms of opening markets to competition.

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DOCUMENT	SUBJECT MATTER	LOCATION
<u>Attachment 1</u>	Tom Leithauser, <i>N.Y. PSC Decision on UNEs May Alter Market 'Psychology,' Analysts Say</i> , Jan. 24, 2002	Page s 12, 13
<u>Attachment 2</u>	Simon Romero, <i>In Another Big Bankruptcy, A Fiber Optic Venture Fails</i> , The New York Times, Jan. 29, 2002	Page 12
<u>Attachment 3</u>	<i>Commission Votes to Reduce Verizon's Wholesale Rates: Significant Reductions Will Foster More Robust Competition and Lower Phone Rates</i> , New York Public Service Commission, Press Release, Jan. 23, 2002	Page 18
<u>Attachment 4</u>	<i>Joint Petition of FirstEnergy Corp. and Jersey Central Power and Light Company, d/b/a GPU Energy, for Approval of a Change in Ownership and Acquisition of Control of a New Jersey Public Utility and Other Relief</i> , BPU Docket No. EM00110870, Excerpted Testimony of Richard Marsh	Page 13
<u>Attachment 5</u>	Simon Romero, <i>Verizon Is Told to Cut Access Rates</i> , Jan. 24, 2002	Page 19

TABLE OF SELECTED CITATION FORMS

SHORT CITE	FULL CITE
<i>Sprint v. FCC</i>	<i>Sprint Communications Co. v. FCC</i> , 274 F.3d 549 (D.C.Cir. 2001).
FCC MI 271 Order	<i>Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan</i> , 12 FCC Rcd 20543, CC Docket No. 97-137, FCC 97-298, Memorandum Opinion and Order (1997).
FCC LA II 271 Order	<i>Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana</i> , 13 FCC Rcd 20599, CC Docket No. 98-121, FCC 98-271, Memorandum Opinion and Order (1998).
Selwyn Declaration	Declaration of Lee L. Selwyn [Attachment 8 of Ratepayer Advocate Comments].
Selwyn BPU Declaration	<i>I/M/O Application of Verizon New Jersey Inc. for FCC Authorization to Provide In-Region, InterLATA Service in New Jersey</i> , Declaration of Lee L. Selwyn for the Ratepayer Advocate Before the New Jersey Board of Public Utilities (filed Oct. 22, 2001) [Attachment 2 to Attachment 8 of Ratepayer Advocate Comments].
Summary Order	<i>I/M/O The Board's Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic New Jersey Inc.</i> , Board Docket No. TO00060356, Summary Order of Approval, Attachment C (rel. Dec. 17, 2001).
FCC OK 271 Order	<i>Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Oklahoma</i> , 12 FCC Rcd. 8685, CC Docket No. 97-121, FCC 97-228, Memorandum Opinion and Order ¶ 17 (1997).
FCC KS/OK 271 Order	<i>Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, IntraLATA Services in Kansas and Oklahoma</i> , 16 FCC Rcd 6237, CC Docket No. 00-217, FCC 01-29, Memorandum Opinion and Order (rel. Jan. 22, 2001)
FCC NY 271 Order	<i>Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York</i> , 15 FCC Rcd 3953, CC Docket No. 99-295, FCC 99-404 (1999)

SHORT CITE	FULL CITE
Updated 271 Public Notice	<i>Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act</i> , 16 FCC Rcd 6923, 6925, 6927, DA 01-734, Public Notice (March 23, 2001)
Dec. 6 Public Notice	<i>Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act</i> , 11 FCC Rcd 19706, 19709, FCC 96-469, Public Notice (1996)
FCC TX 271 Order	<i>I/M/O Application of SBC Communications, et al., Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas</i> , Memorandum Report and Order, FCC 00-238, CC Docket No. 00-65 ¶ 420 (rel. June 30, 2000).
FCC PA 271 Order	<i>I/M/O Application of Verizon Pennsylvania Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Pennsylvania</i> , Memorandum Opinion and Order, FCC 01-269, CC Docket No. 01-138 ¶ 25 (rel. Sept. 19, 2001).

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Application by Verizon New Jersey)	
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Inc. (d/b/a Verizon Long Distance),)	CC Docket No. 01-347
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The New Jersey Division of the Ratepayer Advocate (“Ratepayer Advocate”) hereby submits these reply comments in opposition to the Application by Verizon New Jersey Inc. (“Verizon-NJ”), Bell Atlantic Communications, Inc., Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in New Jersey filed with the Federal Communications Commission (“Commission”) on December 20, 2001 (“Application”).

I. A GRANT OF SECTION 271 AUTHORITY IS NOT IN THE PUBLIC INTEREST

A. The Commission is Required to Conduct a Separate Public Interest Analysis that Focuses on the State of Competition in New Jersey

The Telecommunications Act of 1996¹ requires that Verizon-NJ show that a grant of section 271 authority is “consistent with the public interest, convenience and necessity.”² The New Jersey Board of Public Utilities (“Board”), in its Consultative Report, purported to find that granting 271 authority would serve the public interest.³ The Board based that finding, however, on a conclusory set of subsidiary findings that do no more than restate its findings that Verizon-NJ met the requirements of Track A and the competitive checklist.⁴ The Board’s “public interest” finding, therefore, provides no separate analysis of that important requirement of section 271.

Section 271, however, requires that the public interest be determined by more than such superficial analysis. The D.C. Circuit, in *Sprint v. FCC*, recently made clear that under Section 271 the FCC must consider the public interest separate and apart from the other statutory criteria.⁵ Because the 1996 Act focuses on encouraging competition, arguments addressed to competitive issues deserve special weight.⁶ Accordingly, in *Sprint v. FCC* the court held the Commission’s public interest analysis inadequate because the Commission had not properly considered the likely effect of UNE prices on competition, even though the court upheld the Commission’s finding that those same UNE prices complied with the competitive checklist.⁷

¹ 47 U.S.C. §§ 151 *et. seq.*, Pub. L. No. 104-104, 110 Stat. 56 (1996) (“1996 Act”).

² 47 U.S.C. § 271(d)(c)(3).

³ Consultative Report of the New Jersey Board of Public Utilities (“Consultative Report”) at 86.

⁴ 47 U.S.C. §§ 271(c)(1)(A), -(2)(B).

⁵ *Sprint v. FCC* at 555.

⁶ *Id.*

⁷ *Sprint v. FCC* at 554-562.

Similarly, in this proceeding the Commission must directly consider whether New Jersey's telecommunications markets are sufficiently competitive to determine whether Verizon-NJ's 271 Application should be granted.

B. Local Competition is the Proper Focus of the Commission's Public Interest Inquiry

As the Ratepayer Advocate points out, and a number of Commenters agree, the Commission's public interest inquiry must focus upon competitive conditions in the local exchange market.⁸ Indeed, the Commission itself has made abundantly clear that the separate public interest inquiry required under section 271 begins with a consideration of the success or failure of local competition:

We reject that view that our responsibility to evaluate public interest concerns is limited narrowly to assessing whether BOC [Bell Operating Company] entry would enhance competition in the long distance market ... In adopting section 271, Congress mandated, in effect, that the Commission not lift the restrictions imposed by the MFJ on BOC provision of in-region, interLATA services, until the Commission is satisfied on the basis of an adequate factual record that the BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition.⁹

This analysis of local competition, as a fundamental goal of the 1996 Act, must be a primary consideration in any assessment of the public interest implications of the addition of Verizon-NJ to the long distance market in New Jersey.

The evidence on local competition in this case is easy to digest. There is no effective residential local exchange competition in New Jersey.¹⁰ This fact, or some variant of it, is repeatedly recognized by the Board in its Consultative Report, in which the Board references

⁸ RPA Comments at 26-33; *see* AT&T Comments at 33-35, Cavalier Comments at 2-5, Sprint Comments at 1, 3-4, XO Comments at 26-27, Z-Tel Comments at 3-7.

⁹ FCC MI 271 Order ¶ 386.

¹⁰ RPA Comments at 26-31 (demonstrating that no competition exists in the residential local market and that Verizon-NJ presented no evidence of the geographic distribution of competition in any service); *see also* AT&T Comments at 33-35, Cavalier Comments at 2-5, Sprint Comments at 1, 3-4, XO Comments at 26-27, Z-Tel Comments at 3-7.

“the low level of residential market share of CLECs,” and observes that local competition in New Jersey is “less than we had hoped for[.]”¹¹ Given the near universal recognition of the absence of meaningful residential local exchange competition in New Jersey, the Commission should find that a grant of section 271 authority is contrary to the public interest at this time.

The Telecommunications Research and Action Center (“TRAC”) submitted a study projecting long-distance savings in New Jersey if Verizon-NJ receives section 271 authority.¹² This study is incomplete because it provides no information on the key question of local competition and is unreliable even for its limited purpose of projecting long distance savings. First, because the Study is based on data that TRAC itself describes as “soon-to-be-released,”¹³ it cannot be reviewed by the Commission or any Commenter to test its validity. Second, the methodology of the TRAC Study is flawed, because it projects savings by erroneously comparing Verizon-NJ’s lowest prices with averages of competitors’ prices.¹⁴ For these reasons, the Commission should disregard the spurious results of the TRAC Study.

C. The Ratepayer Advocate is the Only Party To the Proceeding that Submitted a Complete Public Interest Analysis To the Commission

The Commission has repeatedly indicated that it expects the state commission “to develop a comprehensive, factual record regarding the opening of the BOC’s local networks to competition.”¹⁵ Moreover, since the state commission is in the best position to evaluate local conditions, the Commission relies heavily on the record developed in the state proceeding in making the public interest determination required under section 271.¹⁶ In addition to state

¹¹ Consultative Report at 86.

¹² TRAC Comments, Attachment I, Projecting Residential Savings in New Jersey’s Telephone Market, (“TRAC Study”).

¹³ *Id.*, Attachment at 2, Appendix at 4.

¹⁴ Selwyn Declaration ¶¶ 25-29.

¹⁵ FCC MI 271 Order ¶ 30; *see also* FCC LA II 271 Order ¶ 22.

¹⁶ *See* FCC MI 271 Order ¶ 30.

commission input, Congress also provided that the Attorney General would assess the validity of the BOC's petition.¹⁷

Unfortunately, the Board provided the Commission with scant evidence on the actual state of competition in New Jersey and how the lack of such competition should affect the Commission's public interest analysis. Indeed, the Board provided a mere two paragraphs of "findings" concerning this important subject.¹⁸ Moreover, those paragraphs are contradictory: the Board repeatedly stated that the levels of local residential competition are low but then recommended a grant of section 271 authority based in part on the prospective benefits to competition in long distance.¹⁹ The Board never examined the areas addressed in the Ratepayer Advocate's arguments regarding the need for showings of actual residential local exchange competition and proper geographic distribution of such competition as crucial elements of the public interest analysis.²⁰ The Department of Justice, while pointedly noting that facilities-based residential competition is exceedingly low in New Jersey, stops short of making the logical connection between this failing and Verizon-NJ's inability to satisfy the public interest standard.²¹ Under *Sprint v. FCC*, this is precisely the sort of analysis the Commission must undertake.

The Ratepayer Advocate addressed the lack of local competition and its relation to the public interest analysis under section 271 in the state proceeding.²² Indeed, in its initial comments, the Ratepayer Advocate reiterated its comprehensive analysis of the public interest

¹⁷ 47 U.S.C. § 271(d)(2)(A).

¹⁸ Consultative Report at 86-87.

¹⁹ *Id.*

²⁰ See RPA Comments at 26-33.

²¹ Evaluation of the United States Department of Justice ("DOJ Evaluation") at 5.

²² RPA Comments at 26-33.

criterion and Verizon-NJ's failure to meet it.²³ Other parties have likewise raised serious public interest concerns that necessarily affect the Commission's analysis.²⁴ Each of these analyses is more comprehensive, and therefore more pertinent to the public interest analysis, than the New Jersey Board's Consultative Report, given the brevity of its public interest analysis. The Commission should therefore (1) accord the Board's analysis of the public interest minimal weight, and (2) rely upon the comprehensive analyses submitted by the Ratepayer Advocate and other parties to this proceeding, that demonstrate that the lack of local competition precludes a finding that Verizon-NJ's section 271 application is in the public interest.²⁵

D. There is No Local Competition in New Jersey

The Ratepayer Advocate demonstrates below that Verizon-NJ's Application does not comply with Track A. As discussed in Section I.A., however, irrespective of the Commission's findings on Track A requirements, it must perform a separate analysis of local competition under the public interest criterion.²⁶ If, as the facts in this case demonstrate, local competition will not develop under a grant of section 271 authority, *Sprint v. FCC* requires that the incumbent's application be denied on those grounds alone.²⁷ Because the Commenters in this proceeding²⁸ have demonstrated that local competition is now seriously underdeveloped and likely to grow worse under a grant of section 271 authority, and statements by the Board and the Department of

²³ *Id.*

²⁴ AT&T Comments at 32-53, Cavalier Comments at 2-5, Sprint Comments at 1-12, XO Comments at 21-28, Z-Tel Comments at 3-7.

²⁵ AT&T Comments at 32-53, Cavalier Comments at 2-5, Sprint Comments at 1-12, XO Comments at 21-28, Z-Tel Comments at 3-7.

²⁶ *See generally Sprint v. FCC.*

²⁷ *See Sprint v. FCC* at 553.

²⁸ AT&T Comments at 32-53, Cavalier Comments at 2-5, Sprint Comments at 1-12, XO Comments at 21-28, Z-Tel Comments at 3-7.

Justice confirm that levels of competition in New Jersey are generally low,²⁹ the Commission must reject Verizon-NJ's Application.

Despite Verizon-NJ's claims to the contrary,³⁰ UNE- and facilities-based competitors cannot and do not compete with Verizon-NJ for residential customers in New Jersey.³¹ This fact is borne out by the analysis of Dr. Selwyn, the Ratepayer Advocate's declarant, of the numbers proffered by Verizon-NJ: according to the incumbent's own reported figures, facilities-based competitors serve a paltry 0.0196% of the residential access lines in New Jersey.³² That equates to one out of every 5,102 access lines.³³ AT&T astutely notes that competitors serve a far greater percentage of residential access lines in rural Arkansas than in New Jersey, the most densely populated state in the nation.³⁴ And the Department of Justice notes that there is "significantly less competition to serve residential customers by means of facilities and the UNE-Platform."³⁵ This less than *de minimis* amount of local competition is not what was envisioned by the 1996 Act and, more importantly, it brings no benefit to the majority of ratepayers in New Jersey. For this reason alone, a grant of section 271 authority at this time is not in the public interest.

A grant of section 271 authority is very likely to damage hard won competition in the long distance market:

²⁹ Consultative Report at 86, DOJ Evaluation at 5.

³⁰ See, e.g., Verizon-NJ Application at 82 ("[T]here is extensive local competition in New Jersey, and that competition is taking place across the State and through all three entry paths under the Act").

³¹ See AT&T Comments at 40-47, Cavalier Comments at 3, Sprint Comments at 9-11, Z-Tel Comments at 2-7.

³² Selwyn Declaration ¶ 12.

³³ And it is worth noting that the numbers of facilities-based residential competitors offered by Verizon-NJ in this proceeding are significantly greater than those offered in the underlying proceeding before the New Jersey Board. Verizon-NJ has yet to explain the discrepancy. RPA Comments at 29-30.

³⁴ AT&T Comments at 47.

³⁵ DOJ Evaluation at 5.

If the local market is not open to competition, the incumbent will not face serious competitive pressure from new entrants, such as the major interexchange carriers. In other words, the situation would be largely unchanged from what prevailed before passage of the 1996 Act ... In order to effectuate Congress' intent, we must make certain that the BOCs have taken real, significant, and irreversible steps to open their markets.³⁶

Dr. Selwyn demonstrated that, given its monopoly on local residential service, Verizon-NJ's use of the inbound marketing channel (*i.e.*, customers calling to establish local service) will allow it to capture 71% of the long distance market within five years.³⁷ This overwhelming market dominance will inevitably mean decreased revenues for all interexchange carriers and a declining number of New Jersey competitors for long distance service, while Verizon-NJ maintains unbridled control over the local exchange market.³⁸

The FCC stated that to meet the section 271(c)(1)(A) requirement, a BOC must show that at the very least, more than a *de minimis* number of residential customers are served over a competitor's facilities.³⁹ While the FCC has not set a specific *de minimis* number in 271 Applications, the Commission has set specific *de minimis* numbers in other instances. For instance, the Commission consistently applies the "mixed facilities doctrine" where lines carrying more than a *de minimis* 10 percent of interstate traffic, fall under the Commission's jurisdiction.⁴⁰

³⁶ FCC MI 271 Order ¶ 18.

³⁷ Selwyn BPU Declaration ¶ 83.

³⁸ Selwyn BPU Declaration ¶ 90.

³⁹ See FCC KS/OK 271 Order ¶ 42.

⁴⁰ See, *MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Decision and Order, CC Docket Nos. 78-72, 80-286 ¶ 2 (Rel. June 29, 1989); see also, *e.g.*, *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Memorandum Opinion & Order, MM Docket No. 00-39, FCC 01-330 ¶ 60 (Rel. Nov. 15, 2001); *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service Public Interest Obligation*, Memorandum Opinion & Order on Reconsideration of the 6th R & O, MM Docket No. 87-268, FCC 98-24 ¶ 60 (Rel. Feb. 23, 1998) (defining *de minimis* interference as affecting less than two percent of the population served by another analog or DTV station); see *Implementation of the Local Competition Provisions Of the Telecommunications Act of 1996*, Supplemental Order Clarification, CC Docket No. 96-98, FCC 00-183 ¶ 26 (rel. June 2, 2000); *MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and*

The Commission has also consistently compared contiguous states to develop a range of reasonableness in order to determine regulatory compliance. In its Kansas/Oklahoma decision, the Commission found that comparisons between contiguous states provides evidence regarding the reasonableness of rates. Specifically, the Commission stated that:

We therefore compare SWBT's rates in Oklahoma to SWBT's rates in Texas. We do so because they are adjoining states; because the two states have a similar, if not identical, rate structure for comparison purposes; and because we have already found the rates in Texas reasonable. Given that the Commission has already found the rates in Texas to be TELRIC-based, however, a comparison that reasonably accounts for the differences in the rates between these two states would lead us to conclude that the rates in Oklahoma are also reasonable. We note that for the same reasons, and given the fact that Oklahoma has higher teledensity than Texas, we clearly could have approved SWBT's Oklahoma rates if it had offered UNEs in Oklahoma at the same rates as it does in Texas.⁴¹

Likewise, the Ratepayer Advocate recommends that, consistent with the Commission's past practices, it should examine the two states (New York and Pennsylvania) that are contiguous to New Jersey to determine whether the level of residential facilities-based competition in New Jersey falls within a range of reasonableness to meet the *de minimis* standard under Track A; and consequently whether approval of 271 authority is in the public interest. Specifically, the Commission determined that Verizon met the *de minimis* standard in New York and Pennsylvania where local residential facilities-based competition was at **1.5%**, and approximately **4.5%** respectively. In New Jersey, however, local residential facilities-based

Establishment of a Joint Board, Decision and Order, CC Docket Nos. 78-72, 80-286 ¶ 2 (Rel. June 29, 1989) (finding the amount of interstate traffic carried on a circuit is deemed to be *de minimis* if it amounts to ten percent or less of the total traffic on a special access line); *Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, FCC, 98-67 ¶ 121. (Rel. Apr. 10, 1998) (stating that systems integrators' telecommunications revenues will be considered *de minimis*, for purposes of Universal Service contributions, if they constitute less than five percent of revenues derived from providing systems integration services); and see *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, et. al.*, Report and Order, WT Docket No. 96-162, FCC 97-352 ¶ 12 (Rel. Oct. 3, 1997) (deeming ten percent as the *de minimis* standard for overlap).

⁴¹ FCC KS/OK 271 Order ¶ 82.

competition is dismally and significantly lower at **0.0196%**.⁴² At the very least, the *de minimis* standard for New Jersey should fall within the range between New York (the lowest) and Pennsylvania (the highest). This is especially true given that no parties dispute the fact that New Jersey is a lucrative market for telecommunications services, and certainly no less lucrative a market, than New York and Pennsylvania. In fact, as illustrated in the chart below, New Jersey is more densely populated than either New York or Pennsylvania.

POPULATION DENSITIES FOR NEW JERSEY, NEW YORK, AND PENNSYLVANIA ⁴³			
State	Persons per square mile, 2000	Total Population	Total Land Area, square miles
New Jersey	1,134.5	8,414,350	7417
New York	401.9	18,976,457	47,214
Pennsylvania	274.0	12,281,054	44,817

Given New Jersey's greater density than New York and Pennsylvania, it would be appropriate for the Commission to set New Jersey's *de minimis* number at the higher end of the range, and even surpass that of Pennsylvania. It is therefore reasonable for the Commission to apply such a range to determine that approval of 271 authority in New Jersey is premature at this time. To do otherwise would serve to nullify the Track A and public interest requirements.

In short, a grant of section 271 authority at this premature stage of the development of local competition in New Jersey will force New Jersey ratepayers to face virtual monopolies held by Verizon-NJ in both the local exchange and long distance markets. In the Ratepayer Advocate's view, those developments cannot be in the public interest.

⁴² Despite the information provided by Verizon-NJ in an ex parte letter to the Commission dated January 29, 2002, where Verizon-NJ claims an unsubstantiated increase in the number of CLEC residential facilities based customers, those amounts remain below the lower threshold.

E. The D.C. Circuit Decision Requires That the Commission Consider the Price Squeeze Arguments of Competitors

The D.C. Circuit's opinion in *Sprint v. FCC* made abundantly clear that the public interest analysis required by section 271 must respond to price squeeze allegations.⁴⁴ Indeed, because the Commission failed to consider evidence of a price squeeze in Kansas and Oklahoma, its 271 decision was remanded.⁴⁵ The D.C. Circuit indicated that a price squeeze occurs when Verizon-NJ charges its competitors for UNEs at prices that preclude such competitors from realizing a profit in the relevant market.⁴⁶ A number of Commenters presented the Commission with evidence of Verizon-NJ's price squeeze impacting the residential local exchange market.⁴⁷ In order to prevent a remand of its decision in this case, the Commission must thoroughly evaluate the considerable evidence of an existing price squeeze offered by competitors in this proceeding, and deny Verizon-NJ's application at this time.

Specifically, competitors complain about non-recurring "hot cut" charges established by the New Jersey Board in the recently-concluded UNE proceeding.⁴⁸ While the Board lowered certain charges derived from Verizon-NJ's non-recurring cost model, it established an onerous "hot cut" charge of \$159.76 per line.⁴⁹ "Hot cut" rates in other Verizon states vary from \$4.07 to \$29.75 per line.⁵⁰ Thus, Verizon-NJ's new "hot cut" charge is five times greater than its prior "hot cut" charge of \$32.16 and *nearly 40 times* greater than the lowest charge in other states of

⁴³ US Census Bureau (Quick Facts 2000).

⁴⁴ *Sprint v. FCC* at 555-556.

⁴⁵ *Id.*

⁴⁶ *See Sprint v. FCC* at 553.

⁴⁷ AT&T Comments at 7-16, Ascent Comments at 1-7, Cavalier Comments at 4-5, Conversent Comments at 2-6, WorldCom Comments at 5-9, XO Communications Comments at 17-21, Z-Tel Comments at 7-9.

⁴⁸ AT&T Comments at 7-16, Ascent Comments at 1-7, Cavalier Comments at 4-5, Conversent Comments at 2-6, WorldCom Comments at 5-9, XO Communications Comments at 17-21, Z-Tel Comments at 7-9.

⁴⁹ Verizon-NJ's Non-Recurring Cost Model proposed a two-wire hot cut rate of \$159.15. However, the Board's Summary Order establishes a rate of \$159.76. Summary Order, Attachment C.

⁵⁰ XO Communications Comments at 19, AT&T Comments at 11, Szczepanski Declaration at 3.

\$4.07.⁵¹ Faced with these facts, the Commission can reach only one conclusion: unless “hot cut” rates are brought down to their proper TELRIC levels, competitive services requiring migration will be foreclosed in New Jersey. Even if the Commission finds that Verizon-NJ has met other statutory requirements (which it should not), the Commission must demand that Verizon-NJ lower these rates before any grant of section 271 authority.

F. The Lack of Final UNE Rates Chills the Development of Competition

As demonstrated below, there are no final UNE rates in New Jersey.⁵² This causes a direct, serious and immediate anticompetitive effect because it further chills the capital markets’ willingness to provide capital necessary for market entry.⁵³ As Sprint’s Comments detail, the past year has been a terrible one for competitive carriers.⁵⁴ Many CLECs, including Convergent, e-spire, Covad, NorthPoint, WinStar and Teligent, filed for bankruptcy.⁵⁵ On January 29, 2002, Global Crossing joined the list when it announced the largest bankruptcy by a telecommunications company to date.⁵⁶ Moreover, two of the four CLECs that Verizon-NJ touts as providing residential facilities-based local service, eLEC and Network Plus,⁵⁷ are currently experiencing extreme financial distress.⁵⁸

⁵¹ AT&T Comments at 11; *see also* AT&T Comments, Szczepanski Declaration at 3. The DOJ found that wide disparities between rates in contiguous states raise a red flag, and require closer scrutiny. FCC KS/OK 271 Order at 5-6.

⁵² *Infra* Section II.B.

⁵³ See Tom Leithauser, N.Y. PSC Decision on UNEs May Alter Market ‘Psychology,’ Analysts Say, Jan. 24, 2002 (Attachment 1).

⁵⁴ Sprint Comments at 4-8.

⁵⁵ Sprint Comments at 4.

⁵⁶ Simon Romero, *In Another Big Bankruptcy, A Fiber Optic Venture Fails*, The New York Times (January 29, 2002) (Attachment 2).

⁵⁷ Application at 7-10.

⁵⁸ Sprint Comments at 6-7.

Until there is a final order confirming the rates in the Summary Order, CLECs will not be able to rely on those rates to raise capital necessary for their entry and expansion plans.⁵⁹ The refusal of lenders to rely on anything short of firm and final regulatory action is confirmed by the testimony of a financial expert in the New Jersey Board's proceeding concerning the merger of FirstEnergy Corp. and GPU Energy.⁶⁰ He clearly stated that Standard & Poors would delay its rating of the merging companies until the time the merger was consummated and approved.⁶¹ And in a New Jersey Appellate Court decision that considered the stranded costs allocated to Public Service Electric and Gas for its restructuring, the court found that securitization of the utility's stranded costs would not occur until any appeal was resolved.⁶² Accordingly, as long as there is no final UNE rate order⁶³ the Board's new UNE rates will do nothing to help competitors finance procompetitive entry or expansion. Thus, the lack of a final order not only prevents Verizon-NJ from satisfying checklist item 2,⁶⁴ it also exacerbates Verizon-NJ's failure to satisfy the public interest test.

II. VERIZON-NJ FAILS TO SATISFY ITEM 2 OF THE COMPETITIVE CHECKLIST

In addition to demonstrating that its Application is in the public interest, Verizon-NJ must prove that its Application satisfies the separate requirements of each of the fourteen points of the competitive checklist.⁶⁵ Numerous commenting parties have shown that Verizon-NJ fails to

⁵⁹ See Leithauser, *supra* note 44 (Attachment 1).

⁶⁰ Joint Petition of FirstEnergy Corp. and Jersey Central Power and Light Company, d/b/a GPU Energy, for Approval of a Change in Ownership and Acquisition of Control of a New Jersey Public Utility and Other Relief, BPU Docket No. EM00110870 ("FirstEnergy").

⁶¹ FirstEnergy, Testimony of Richard A. Marsh at 11 (Attachment 4).

⁶² Public Service Elec. & Gas Co.'s Rate Unbundling, Stranded Costs and Restructuring Filings, 748 A.2d 1161, 1202 (N.J. App. Div. 2000).

⁶³ *Infra* Section II.B.

⁶⁴ *Id.*

⁶⁵ 47 U.S.C. 271(c)(2)(B).

provide nondiscriminatory access to its UNEs, as required by checklist item 2.⁶⁶ In particular, these parties demonstrated that Verizon-NJ failed to show that it is providing nondiscriminatory access to its operational support systems (“OSS”), or that it is offering UNEs at proper cost-based rates.⁶⁷ On these bases alone, the Commission should reject Verizon-NJ’s Application .

A. Verizon-NJ Failed to Demonstrate that It Is Providing Nondiscriminatory Access to OSS

As AT&T and MetTel state in their comments, the Commission has expressly determined that the most compelling evidence that a BOC satisfies the OSS component of checklist item 2 “is actual commercial usage in the State for which the BOC seeks 271 authorization.”⁶⁸ Because of the very low level of competitive entry (almost all of which is via resale and for business consumers⁶⁹) Verizon-NJ has failed to provide evidence that it affords competitive local exchange carriers (“CLECs”) with nondiscriminatory access to its OSS in a manner sufficient to support commercial usage volumes that would be present in a fully competitive marketplace.⁷⁰ Indeed, the Department of Justice questioned whether the low commercial levels of use permit any positive conclusion regarding Verizon-NJ’s OSS obligation. Specifically, the Department found that, “given the level of competitive entry in New Jersey, it is difficult to assess whether Verizon’s electronic wholesale billing system is working properly.”⁷¹

⁶⁶ AT&T Comments at 7-29; Metropolitan Telecommunications (“MetTel”) Comments at 4-12, 14-15; New Jersey Cable Telecommunications Association (“NJCTA”) Comments at 4-9; WorldCom Comments at i-ii, 1-5.

⁶⁷ AT&T Comments at 7-29; MetTel Comments at 4-12, 14-15; NJCTA Comments at 4-9; WorldCom Comments at i-ii, 1-5.

⁶⁸ AT&T Comments at 17 (quoting FCC KS/OK 271 Order ¶ 105); *see* MetTel Comments at 5, 10.

⁶⁹ *See supra* Section I.D; DOJ Evaluation at 4-6.

⁷⁰ AT&T Comments at 17, 23; *see* MetTel Comments at 10.

⁷¹ DOJ Evaluation at 6 n. 21. The Ratepayer Advocate concurs with the DOJ’s recommendation that the Commission monitor Verizon’s post approval performance in this area, as was done in Pennsylvania.

While low usage by competitive carriers of Verizon-NJ's OSS is not by itself dispositive of Verizon-NJ's ability to satisfy checklist item 2,⁷² it is fatal when combined with the evidence offered by CLECs showing that Verizon-NJ's OSS is flawed even at the present low usage levels.⁷³ For example, both AT&T and MetTel showed that Verizon-NJ failed to adequately provide CLECs with billing completion notices / order completion notices ("BCNs").⁷⁴ Indeed, in its comments, AT&T showed that Verizon-NJ's own reporting demonstrated that Verizon-NJ failed to meet the appropriate benchmark standard for providing BCNs on UNE orders in each of the five months immediately preceding Verizon-NJ's filing of its Application.⁷⁵ Without timely and complete BCNs from Verizon-NJ, CLECs cannot properly bill and otherwise interact with their customers.⁷⁶ Accordingly, the Commission has previously required any BOC 271 applicant "to demonstrate that it provides competing carriers with order completion notices [BCNs] in a timely and accurate manner."⁷⁷

In addition to Verizon-NJ's inadequate provision of BCNs, CLECs have also demonstrated flaws in Verizon-NJ's OSS in the areas of electronic ordering (excessive manual intervention), order rejections, billing accuracy, loop provisioning, local usage data and trouble ticket timeliness and accuracy.⁷⁸ If Verizon-NJ is unable to satisfy its OSS obligations at today's low commercial volumes, it follows that Verizon-NJ would experience increased OSS failures at higher commercial volumes.

⁷² FCC KS/OK 271 Order ¶ 105.

⁷³ See AT&T Comments at 20-23, Kirchberger/Nurse/Kamal Declaration ¶¶ 61-112; MetTel Comments at 4-16.

⁷⁴ AT&T Comments at 22, Kirchberger/Nurse/Kamal Declaration ¶¶ 92-107; MetTel Comments at 8-14.

⁷⁵ AT&T Comments at 22, Kirchberger/Nurse/Kamal Declaration ¶¶ 97-99.

⁷⁶ FCC NY 271 Order ¶ 187; AT&T Comments at 22, Kirchberger/Nurse/Kamal Declaration ¶¶ 93-94; MetTel Comments at 9.

⁷⁷ FCC NY 271 Order ¶ 187.

⁷⁸ AT&T Comments at 20-21, 23, Kirchberger/Nurse/Kamal Declaration ¶¶ 61-91, 108-115; MetTel Comments at 10-12, 14-15.

These failures are not cured by the existence of a performance assurance plan.⁷⁹ The New Jersey Board did not release its order establishing the performance assurance plan until January 10, 2002, well after Verizon-NJ filed its Application.⁸⁰ Further, the additional electronic billing metrics required by the Board in its consultative report have not yet been implemented.⁸¹ Thus, not only has there been no time to evaluate the impact of the plan, but any reliance by Verizon-NJ on the plan prior to its release and its implementation was entirely premature.⁸² Moreover, while the existence of a performance assurance plan may help prevent Verizon-NJ's wholesale performance from deteriorating, it is not itself evidence that Verizon-NJ is providing nondiscriminatory access (or, for that matter, any particular level of access) to Verizon-NJ's OSS.

Finally, as AT&T demonstrated,⁸³ Verizon-NJ's reliance on KPMG's OSS testing is overplayed.⁸⁴ In particular, the data that Verizon-NJ provided to KPMG for the test was of questionable reliability, and KPMG failed to notice this. For almost a year and a half, Verizon-NJ excluded data for 5 of New Jersey's 6 area codes when providing data to KPMG on some digital services for troubles reported within 30 days of installation.⁸⁵ KPMG not only failed to take into account this failure by Verizon-NJ to provide complete data, but failed even to recognize that Verizon-NJ had provided incomplete information.⁸⁶ This type of fundamental

⁷⁹ See AT&T Comments at 24-29; *cf.* Application at 18.

⁸⁰ *I/M/O Investigation Regarding Local Exchange Competition for Telecommunications Services*, NJBPU Docket Nos. TX95120631, TX98010010, Order Approving Incentive Plan (rel. Jan. 10, 2002).

⁸¹ Consultative Report at 41.

⁸² See AT&T Comments at 24-25.

⁸³ AT&T Comments at 17-20, 26, Kirchberger/Nurse/Kamal Declaration ¶¶ 19-60, Bloss/Nurse Declaration ¶¶ 38-41.

⁸⁴ Application at 16-17, 58.

⁸⁵ AT&T Comments at 25-26, Bloss/Nurse Declaration ¶ 40; RPA Comments at 22, Attachment 14.

⁸⁶ AT&T Comments at 25-26, Bloss/Nurse Declaration ¶ 40; RPA Comments at 22, Attachment 14.

flaw in KPMG's report considerably undermines the probative value of the report, as well as the Board's recommendation, which relied on KPMG's report.⁸⁷

Consequently, for these reasons, Verizon-NJ failed to demonstrate that it is providing nondiscriminatory access to its OSS, as required by checklist item 2.

B. Verizon-NJ Failed to Show that it is Providing UNEs at Cost-Based Rates

Verizon-NJ has not shown – and indeed, by its own admission, cannot show⁸⁸ – that it was providing UNEs to CLECs at proper total element long-run incremental cost (“TELRIC”) rates⁸⁹ when it filed its Application (or even today). Despite the Board's assertions to the contrary,⁹⁰ as NJCTA, AT&T and WorldCom persuasively show, there are presently no final, TELRIC-compliant UNE rates in New Jersey, and Verizon-NJ has yet to charge CLECs proper TELRIC rates for UNEs.⁹¹ Accordingly, Verizon-NJ has failed to satisfy its checklist item 2 obligations.

1. There Are No Final UNE Rates in New Jersey

There is no final order in the New Jersey UNE cost case. Instead, the Board has only released a Summary Order.⁹² By its own terms, the Summary Order is not a final order:

A final Order *will* be issued in this matter fully setting forth the Board's analysis of the issues, the positions of the parties, and the reasoning underlying the Board's determinations⁹³ (emphasis added).

Thus, as NJCTA, AT&T and WorldCom explain, because the Board did not explain how it arrived at the UNE rates in the Summary Order, but will do so in a final order that has yet to be

⁸⁷ New Jersey Board Consultative Report at 30, 33-34, 42-43.

⁸⁸ See RPA Comments, Attachment 19.

⁸⁹ See 47 U.S.C. §§ 251(c)(2)(D), -(c)(3), 252(d); 47 C.F.R. § 51.505.

⁹⁰ Consultative Report at 24.

⁹¹ NJCTA Comments at 4-9; AT&T Comments at 7-16; WorldCom Comments at ii, 1-5.

⁹² Summary Order, *supra* note 50; see NJCTA Comments at 4-6; AT&T Comments at 9; WorldCom Comments at i, 4-5.

⁹³ Summary Order, *supra* note 50, at 2; see also DOJ Evaluation at 6-7 (quoting same).

released, the Commission has no basis for analyzing whether these rates are TELRIC-compliant (and otherwise consistent with the public interest, *see supra* Section I.F.).⁹⁴

These unfortunate circumstances are compounded by the uncertainty created by the lack of a final UNE order.⁹⁵ Final UNE rates are crucial to the development of local competition. Indeed, the Chairman of the New York Public Service Commission emphatically stated this last week when commenting on that Commission's considerable lowering of UNE rates.

Accurate pricing of wholesale service is absolutely critical to the development of facilities-based as well as unbundled network element-based competition in the local phone market.⁹⁶

Only after the Board releases its final order establishing UNE rates will Verizon-NJ and other parties to the UNE rate proceeding be able to file an appeal of the Board's order. Indeed, in its Evaluation the Department of Justice expressly noted that "Verizon has not addressed the possibility of appeal."⁹⁷ According to New Jersey Court Rule 2:4-1(b), a party has 45 days from the issuance of a final order to appeal that order. Because the Board has yet to issue a final order, the 45-day window has not yet begun to run. Further, if Verizon-NJ (or another party) waits the entire 45-day period to appeal the forthcoming UNE order, the appeal almost certainly would not be filed, let alone decided, before the Commission must vote on the Application.⁹⁸ The Commission will almost certainly not know if Verizon-NJ will appeal the UNE order and refuse to implement the new UNE rates prior to voting on the Application. Such knowledge is of critical importance, particularly in light of Verizon's statements that it likely will appeal the New

⁹⁴ NJCTA Comments at 4-6; AT&T Comments at 9; WorldCom Comments at i, 4-5.

⁹⁵ *Infra* Section II.B.

⁹⁶ Commission Votes to Reduce Verizon's Wholesale Rates: Significant Reductions Will Foster More Robust Competition and Lower Phone Rates, New York Public Service Commission, Press Release, Jan. 23, 2002, at 1 ("NY PSC Press Release") (Attachment 3).

⁹⁷ DOJ Evaluation at 7.

⁹⁸ If the Board does not issue its final order on or before February 4, 2002, the 45-day window will not have run before the Commission's March 20, 2002 deadline.

York Commission's recent order that substantially lowered UNE rates.⁹⁹ Without a commitment by Verizon-NJ concerning its plans for an appeal, the Commission cannot say, even after a final order issues, that it has before it UNE rates on which it can rely for purposes of checklist item 2.

2. Verizon-NJ's Application Is Fatally Incomplete Because Verizon-NJ Has Yet to Implement the New Rates

Even if the rates adopted in the Summary Order could be deemed TELRIC-compliant, Verizon-NJ has yet to implement these rates, as NJCTA and WorldCom show.¹⁰⁰ Rather, on January 9, 2002, coincident with its voting to support Verizon-NJ's Application, the Board

required [Verizon-NJ] to provide the Board by the end of business on January 10, 2002, an officer's certification that these rates [adopted in the Summary Order] are being charged effective December 17, 2001.¹⁰¹

In response, Verizon-NJ merely stated that it was working to implement the new rates, but that actual billing of CLECs at the new rates would not occur for several months.

Verizon NJ is working on an expedited basis to implement the system changes required for the new UNE rates. . . . [I]mplementation and handling of these billing changes will vary based on the rate classification, *i.e.*, Monthly recurring rate, Non-recurring rate, or Usage, and whether the product is billed using CRIS or CABS. . . . Billing is a cycle-driven process, and certain of the charge changes, although effective as of December 17, 2001, *will likely not be reflected until the first or second bill after the software implementation is completed.*¹⁰² (emphasis added)

⁹⁹ Simon Romero, *Verizon Is Told to Cut Access Rates*, Jan. 24, 2002 (Attachment 5); *see* NJCTA Comments at 7.

¹⁰⁰ NJCTA Comments at 6-8; WorldCom Comments at 4-5; *see* RPA Comments, Attachment 19. Verizon-NJ has never charged CLECs TELRIC-compliant rates. From the time that a federal district court ruled on June 6, 2000 that the rates set by the Board were not TELRIC-compliant through the entirety of the UNE cost case that has so far led to the Summary Order, Verizon-NJ continued to assess on CLECs the non-TELRIC rates struck down by the court. AT&T Comments at 9.

¹⁰¹ Letter from Henry M. Ogden, Acting Secretary, New Jersey Board of Public Utilities, to Bruce D. Cohen, Verizon New Jersey, Inc. dated Jan. 9, 2002 (RPA Comments, Attachment 17).

¹⁰² Letter from Bruce D. Cohen, Verizon New Jersey, Inc., to Henry M. Ogden, Acting Secretary, New Jersey Board of Public Utilities dated Jan. 10, 2002 (RPA Comments, Attachment 19).

Contrary to the Board's assertion that the Verizon-NJ certification is sufficient,¹⁰³ Verizon-NJ clearly showed that the new rates are presently not available to CLECs.¹⁰⁴

With full implementation of the new UNE rates not occurring until two billing cycles (or more) after Verizon-NJ makes the necessary software changes to its systems, as commenters NJCTA and WorldCom state, it is all but assured that Verizon-NJ will not even be billing the new rates by the time the Commission must vote on Verizon-NJ's Application.¹⁰⁵ This emphatically demonstrates that Verizon-NJ's Application is deficient. The Commission has repeatedly warned BOCs that their section 271 applications must be complete at the time they are filed, and that promises of future compliance may not be relied upon.¹⁰⁶

[W]e find that a BOC's promises of *future* performance to address particular concerns raised by commenters have no probative value in demonstrating its *present* compliance with the requirements of section 271. Paper promises do not, and cannot, satisfy a BOC's burden of proof. In order to gain in-region, interLATA entry, a BOC must support its applications with actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior¹⁰⁷ (emphasis added).

Therefore, because Verizon-NJ not only will not be billing the new rates when the Commission votes on its Application, but was clearly not billing these rates when it filed its Application, the Application was not complete when it was filed. Thus, it must be rejected by the Commission.

In addition, since Verizon-NJ only promised that it would implement the new UNE rates in the future, it is impossible for any party to comment on Verizon-NJ's implementation of the new rates. Verizon-NJ's claim precludes the Commission itself from performing any analysis of

¹⁰³ Consultative Report at 24.

¹⁰⁴ NJCTA Comments at 7-9; WorldCom Comments at 4-5.

¹⁰⁵ NJCTA Comments at 7-9; WorldCom Comments at 4.

¹⁰⁶ *E.g.*, Updated 271 Public Notice, 16 FCC Rcd at 6925, 6927; Dec. 6 Public Notice, 11 FCC Rcd at 19709; FCC MI 271 Order ¶¶ 51, 55.

¹⁰⁷ FCC MI 271 Order ¶ 55 (emphasis in original).

Verizon-NJ's alleged implementation of the rates.¹⁰⁸ Accordingly, Verizon-NJ's Application is premature at this time, and the Commission is therefore precluded from providing its approval until there has been time for the local exchange marketplace to reflect the Board's decision on new UNE rates.

¹⁰⁸ NJCTA Comments at 9; WorldCom Comments at 4.

CONCLUSION

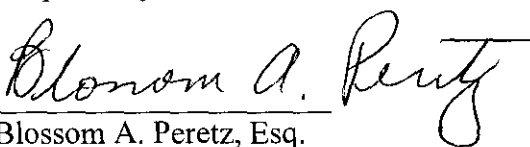
For the foregoing reasons, the New Jersey Division of the Ratepayer Advocate respectfully recommends that the Commission reject Verizon-NJ's Application to provide in-region, interLATA services in New Jersey because Verizon-NJ failed to demonstrate that the Application is in the public interest or that it satisfies competitive checklist item 2.

Dated: February 1, 2002

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CERTIFICATE OF SERVICE

I, Leslie LaRose, hereby certify that on this 1st day of February, 2002, I have served a copy of the foregoing document via hand delivery , overnight mail* and U.S. Mail, postage pre-paid, to the following:



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Attachment 1

continuing downturn. He also said Corning would trim its 2002 capital expenditures to about \$500 million, down from previous guidance of \$700 million. -- John Curran, jcurran@tr.com

N.Y. PSC DECISION ON UNES MAY ALTER MARKET 'PSYCHOLOGY,' ANALYSTS SAY

A decision by the New York Public Service Commission to reduce the rates Verizon Communications can charge competitors for unbundled network elements (UNEs) caught the attention of Wall Street today. Analysts issued reports suggesting the New York decision was a psychological blow for investors who had hoped the regulatory winds were blowing in favor of the Bell companies.

"The N.Y. PSC's decision raises a number of questions about the future of UNE rates in the other 49 states," said Frank J. Governali of Goldman, Sachs & Co. "Could this set off a broader downward trend of UNE rates that the companies have feared? We think the prospects are high that this action, if left standing, will influence other states in this direction."

Verizon yesterday said it was considering challenging the PSC decision (TRDaily, Jan. 23). If the decision stands, the company warned that it might reduce its capital spending in New York to make up for decreased UNE revenue.

Mr. Governali figured the decision would cost Verizon \$200 million annually. But he said the PSC decision would affect Verizon further by generating more competition in New York. "Another important element of this decision is on the market psychology front," he said.

"Many people had started thinking that regulators were increasingly motivated to limit support of resale models in local competition in favor of facilities-based incentives," he added. "This New York action is likely to alter this expectation."

But the decision has the opposite effect on the competitive local exchange carrier industry. Analysts who follow that sector said Allegiance Telecom, Inc., and Choice One Communications would be among the beneficiaries of the lower New York rates.

"The decision is a significant psychological win for the competitive carrier group and another indication that the regulatory winds are shifting" away from the Bells, said Peter DeCaprio of Thomas Weisel Partners. -- Tom Leithauser, tleithauser@tr.com

CONVERGYS 4th QTR RESULTS FLAT --

Convergys Corp., a provider of billing and customer-care services for telecom carriers, posted fourth quarter revenues of \$590.7 million, roughly flat with the \$594.0 million of sales generated in the comparable quarter last year. Net income edged up to \$56.4 million in the most recent quarter from \$52.2 million last year. "Given the weak U.S. economy and its impact on many industries we serve, I am pleased with . . . our results," said Jim Orr, chief executive officer.

SHAW COMM. 1st QTR REVS UP, TO \$280M --

Calgary-based Shaw Communications generated \$280 million of revenue in its fiscal first quarter that ended Nov. 30. That's an increase from year-ago totals of about \$215 million. Net

Attachment 2

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The New York Times
ON THE WEB

January 29, 2002

In Another Big Bankruptcy, a Fiber Optic Venture Fails

By SIMON ROMERO

Global Crossing Ltd. ([news/quote](#)), which spent five years and \$15 billion to build a worldwide network of high-speed Internet and telephone lines, filed for bankruptcy protection yesterday, unable to find enough customers to make its network profitable.

The company had attracted many notable business and political figures as investors, including Terry McAuliffe, chairman of the Democratic National Committee, who profited by selling Global Crossing stock before it declined.

Another early investor was former President George Bush, who accepted stock in lieu of an \$80,000 fee for speaking to Global Crossing customers in Tokyo in 1999, although it is not known whether Mr. Bush sold his stock. Other investors included the Tisch family of New York and Lodwick Cook, the retired chairman of ARCO and a big Republican Party fund-raiser.

If the bankruptcy plan is accepted, Global Crossing's chairman, Gary Winnick, will lose control of the company. But the blow has been softened for Mr. Winnick by Global Crossing stock deals that have reaped him more than \$730 million. Mr. Winnick, a former associate of Michael R. Milken, founded the company in Beverly Hills, Calif., in 1997.

Others have not fared as well. Global Crossing shares have fallen more than 99 percent, to 13.5 cents, in over-the-counter trading yesterday after being delisted by the New York Stock Exchange; as recently as March 2000, they traded for more than \$60. Since that high point, more than \$40 billion of the company's market value has evaporated.

"I don't know how the management of this company did so well while small shareholders did so poorly," said Linda Lorch, a primary-school teacher in Scarsdale, N.Y., who said she lost more than \$120,000 on Global Crossing stock.

Global Crossing has never reported an annual profit since it was created in an ambitious plan to extend its sole resource — a fiber optic cable traversing the Atlantic Ocean — into a 100,000-mile network connecting 27 countries in the Americas, Europe and Asia. The company has \$22.4 billion in assets and \$12.4 billion in debt, making its filing the largest bankruptcy by a telecommunications company. It is almost half the size of Enron ([news/quote](#)), the largest bankruptcy filing of any kind in United States.

Like Enron, Global Crossing staked its future on hopes of bullish demand for high-speed,

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or broadband, data transmission. Whereas Enron sought and failed to create a market for trading broadband capacity, Global Crossing tried and failed to make a profit from selling capacity directly to telephone and Internet service providers and large companies. In its operations, Global Crossing lost an estimated \$7 billion in the last five years.

"Sometimes it takes the markets time to catch up to visionary ideas," said Mike Sitrick, a spokesman for Mr. Winnick. He added that Mr. Winnick was "confident that the markets will eventually recognize the value of the business."

Based for tax reasons in Bermuda but managed from luxurious offices in Beverly Hills, Global Crossing grew through a combination of high-priced acquisitions and the rapid construction of undersea and transcontinental cables. By the time it announced plans late last year to cut 3,200 jobs and lower capital spending to \$1.25 billion from \$4 billion, investors had lost faith in Mr. Winnick's strategy.

"This was a foregone conclusion," said Anthony Klarman, a debt analyst at Deutsche Bank ([news/quote](#)). "They never had enough customers."

Two Asian companies, Hutchison Whampoa Ltd. ([news/quote](#)) of Hong Kong and Singapore Technologies Telemedia Ltd., said they would together pay \$750 million for a controlling stake in Global Crossing as part of the filing. The investment, however, depends on Global Crossing's ability to persuade its lenders and bondholders to approve the bankruptcy plan. John Legere, the chief executive of Global Crossing, said in an interview yesterday that management would consider competing bids for control of the company.

"We could not ignore an alternative proposal," Mr. Legere said.

An agreement with lenders on the bankruptcy plan appeared less than certain yesterday, prompting concern that Global Crossing might be headed for a messy collapse instead of a smooth restructuring.

Speculators had assumed last week that Global Crossing would default on its debts, causing bank loans to trade at 30 cents on the dollar and bonds at about 7 percent of face value. After the filing yesterday, prices on bank loans climbed to about 43 cents and bonds to 10 cents.

To avoid liquidation, a common fate in recent telecommunications bankruptcies in which assets are auctioned to the highest bidder, Global Crossing needs to persuade about 20 senior lenders — including Wall Street firms like J. P. Morgan Chase ([news/quote](#)), Merrill Lynch ([news/quote](#)) and Citigroup ([news/quote](#)) — to take part in the reorganization of the company.

Global Crossing also needs to lure bondholders into the deal, but it is not clear what terms it will offer them. Hutchison Whampoa and Singapore Technologies would acquire stakes of about 30 percent each with their investment, valuing Global Crossing at about \$1.25 billion, people close to the company said yesterday.

With bankruptcy eliminating equity investors from the picture, that leaves about 40

percent of Global Crossing's equity to be divided among debtholders, who also expect to get some cash in redemption for their losses. Global Crossing's banks showed leniency to the company this month by agreeing to waive loan violations that would put it in default, but it is not clear whether this approach will be extended to the companies intent on acquiring Global Crossing.

The company's failure to reach a deal with debtholders before filing for bankruptcy has increased concern that its bankruptcy filing could be protracted. A borrowing policy that secured bank financing not with real assets but with shares of Global Crossing subsidiaries that are now almost worthless has added to worries at banks.

"This looks like a very contentious process," said Igor Volshteyn, an analyst with the Tejas Securities Group in Austin, Tex.

An acquisition by Hutchison Whampoa, a conglomerate controlled by Li Ka-shing, the richest man in Hong Kong, had been rumored since last month. But the participation of Singapore Technologies, a telecommunications and Internet concern whose partners include Nippon Telegraph and Telephone ([news/quote](#)) and the BT Group, came as a surprise.

An implicit part of the deal announced yesterday would transfer control of Asia Global Crossing ([news/quote](#)), an independent unit that operates a fiber optic network in Asia, to Hutchison and Singapore Technologies. Global Crossing's network assets in Asia, Latin America and Europe are considered more valuable than its system in North America, which is duplicated by several rivals.

One potential problem with a takeover by foreign entities is resistance from regulators because the company counts among its customers several government institutions, like the Navy. Other customers include American Express ([news/quote](#)) and Microsoft ([news/quote](#)) and large carriers like Deutsche Telekom ([news/quote](#)).

Global Crossing's bankruptcy is expected to reverberate within the telecommunications industry, with large companies like SBC Communications ([news/quote](#)), Verizon Communications ([news/quote](#)) and Cisco Systems ([news/quote](#)) listed among large creditors. In asset terms, Global Crossing's bankruptcy filing is larger than the total of the four largest telecommunications bankruptcies of last year — those of 360Networks, Winstar Communications, PSINet ([news/quote](#)) and Exodus Communications ([news/quote](#)).

Global Crossing is seeking to secure more than \$300 million of debtor-in-possession financing from J. P. Morgan Chase so it can continue operating in a relatively normal fashion, people close to the company said. Global Crossing still has about \$600 million in cash, about half of what it expects to spend this year.

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Attachment 3

STATE OF NEW YORK

Public Service Commission

Maureen O. Helmer, Chairman

Three Empire State Plaza, Albany, NY 12223

Further Details: (518) 474-7080

<http://www.dps.state.ny.us>

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02007/98C1357

COMMISSION VOTES TO REDUCE VERIZON'S WHOLESALE RATES Significant Reductions Will Foster More Robust Competition and Lower Phone Rates

Albany, NY – 1/23/02 – Continuing its role as a national leader in establishing competitive local telephone service markets, the New York State Public Service Commission (PSC) today voted to approve significant reductions in the wholesale prices that Verizon New York, Inc. (Verizon) can charge to competitors for using certain elements of its network to serve customers. The wholesale price reductions will make it more economical for competitors to purchase local telecommunications network elements on a wholesale basis from Verizon to use in providing their own local phone service to customers.

“The Commission continues to open doors for rapid and broad entry by competitors into local telecommunications markets throughout New York State,” said Chairman Maureen O. Helmer. “Accurate pricing of wholesale service is absolutely critical to the development of facilities-based as well as unbundled network element-based competition in the local phone market. The wholesale price reductions approved today reflect a reasonable balancing of interests and should promote more choices and better pricing of local telephone service for both residential and business customers.”

Depending on which facilities, if any, competing local exchange carriers (CLECs) build themselves, they purchase either a platform of Verizon's unbundled network elements (UNE Platform or UNE-P), or individual loops (UNE Loop or UNE-L – the line or “loop that connects the customer to the switch in Verizon's local office) and other network elements to use in providing local phone service. Based on today's Commission decision, the statewide average wholesale monthly price of the UNE-P, using an average customer usage profile, will be reduced from \$27.24 to \$19.14. In Manhattan, the monthly wholesale UNE-P price will fall from \$24.94 to \$15.35. Individual statewide average monthly UNE Loop prices will be reduced to \$11.49 from the current \$14.13. The monthly price of an individual loop in Manhattan will now be \$7.70 as opposed to the current price of \$11.83.

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PSC Commissioner Thomas J. Dunleavy said, "Thanks to the extraordinary efforts of all those involved, the seeds for competitive telecommunications have been sown. New York has historically led the way and we are doing so again. I believe today's decision on UNE pricing will bring us closer to a fully competitive telecommunications market."

Today's decision is the result of a thorough examination of the rates charged by Verizon to CLECs for UNEs that Verizon is required to make available under the provisions of the federal Telecommunications Act of 1996. Comprehensive cost studies prepared by Verizon and substantially adjusted during the course of this proceeding were used to develop the record in this case.

The existing UNE rates were set by the Commission in three phases between 1997 and 1999. In light of new evidence on switching costs submitted in the third phase of the proceeding, and the recognition that costs are continually changing in the evolving telecommunications industry, the Commission initiated another comprehensive review of network element pricing in 1999. Because of the new evidence on switching costs, the Commission also kept a portion of the switching rates set in the first proceeding temporary and subject to refund.

Among the most difficult issues in both UNE cases has been determining the cost of Verizon's network switches. Because of concern that switching rates in the initial UNE case might need further refinement in light of the new evidence, they were kept temporary and subject to refund. The Commission today decided to reserve decision on the amount and manner of any refunds, pending further discussions among the parties and receipt of additional information.

The Commission will issue a written decision detailing today's actions related to UNE rates. The decision in Commission Case 98-C-1357, when available, can be obtained from the Commission's website at <http://www.dps.state.ny.us> by accessing the Commission Documents section of the homepage. Many libraries offer free Internet access. Commission orders can also be obtained from the Files Office, 14th floor, 3 Empire State Plaza, Albany, NY 12223 (518-474-2500).

Attachment 4

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

IN THE MATTER OF THE **JOINT PETITION**
OF FIRSTENERGY CORP. AND JERSEY
CENTRAL POWER & LIGHT COMPANY,
Doing business as **GPU ENERGY,** FOR
APPROVAL OF A CHANGE IN OWNERSHIP
AND ACQUISITION OF CONTROL OF A NEW
JERSEY PUBLIC UTILITY AND OTHER
RELIEF

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: BPU Docket No. EM00110870
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: OAL Docket No. PUCOT01585-01N
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REBUTTAL TESTIMONY

OF

RICHARD A. MARSH

1 operating companies as first tier subsidiaries. No intermediate corporate entities will
2 exist between the holding company and the utility subsidiaries. The corporate structure
3 Mr. Rothschild attributes complexity to in this merger is the same one that exists today
4 for the GPU companies and is the same one that the Board has apparently been able to
5 effectively deal with for many years. No changes to that familiar corporate structure will
6 occur as a result of the merger.

7
8 **Q. Are Mr. Rothschild's descriptions of the current financial condition of FirstEnergy**
9 **accurate.**

10 **A.** No. Mr. Rothschild has omitted relevant information. For example, while he is correct
11 that three of FirstEnergy's utility subsidiaries are rated BB+ by Standard and Poors. (p. 9)
12 he fails to state that both Moody's and Fitch upgraded all FirstEnergy electric utilities to
13 investment grade in the Fall of 2000. In addition, Moody's have all of the FirstEnergy
14 electric utilities on "watch" with positive implications. He also fails to indicate that
15 because of the merger, Standard and Poors has delayed the pending upgrade of the
16 FirstEnergy utility companies because of its use of an "enterprise methodology" in which
17 the rating agency will rate the whole of the post-merger FirstEnergy near the time of
18 closing of the merger. For completeness, I have attached as Attachment RHM-1, an
19 exhibit showing the current ratings of all of the FirstEnergy electric utilities by the three
20 rating agencies.

21
22 **Q. Is Mr. Rothschild correct in his contentions regarding the manipulation of the**
23 **capital structure of utility subsidiaries of a public utility holding company?**

Attachment 5

TECHNOLOGY

Verizon Is Told to Cut Access Rates

By SIMON ROMERO

The New York State Public Service Commission voted yesterday to require Verizon Communications, the state's main local phone carrier, to lower the prices it charges to competitors that use its network.

The decision is expected to bolster efforts to increase competition among local phone companies.

Competing companies like AT&T, WorldCom and Z-Tel of Tampa, Fla., have long complained of losing money on local phone operations in New York because of these charges.

"This will keep us active in the local market," said Michael J. Morrissey, AT&T's vice president for law and government affairs. "The ruling promotes competition in one of the nation's most important markets."

The decision is reminiscent of regulatory efforts in the 1980's to free up the long-distance market by requiring AT&T to open its network to other long-distance carriers like MCI, which is now part of WorldCom, and Sprint. Long-distance rates eventually declined by more than 50 percent.

It has taken much longer to open the market for local phone service. The Telecommunications Act of 1996, which required Verizon and

other big local phone companies like SBC Communications of San Antonio and BellSouth of Atlanta to allow access to their networks, fell short of achieving this when competitors found it expensive to lease space on these systems.

Consumer advocates have argued that the dominant long-distance and local telephone networks, built up over the last century by regulated monopolies with

much as 38 percent.

Yesterday's ruling, which overturned existing rates set from 1997 to 1999 using cost studies prepared by Verizon, was the first of its kind by a state public service commission and was expected to be influential in other states.

Competitors control about 20 percent of the residential calling market in New York and about 25 percent of the business market, but many of these companies cite leasing charges as the main reason for not making money in the state. AT&T, which controls 14 percent of the local residential market, recently halted efforts to sign up new customers in New York.

Verizon, formed two years ago by Bell Atlantic's acquisition of GTE, said the decision would require it to sell below its costs and discourage it from investing in its network. "We are considering taking legal action to try to overturn the decision," Verizon's spokesman, Eric Rabe, said.

AT&T and other companies say that lowering wholesale leasing fees makes it easier for them to justify their own network investments. "We're now able to dream of competing with Verizon on a much larger scale," said D. Gregory Smith, the chief executive of Z-Tel, which provides local phone service to 135,000 residential customers in New York.

A New York ruling may spur competition.

large investments of public funds, are public assets that should be made available to incumbents and their competitors alike. "This is a huge step in the right direction," said Gene Kimmelman, co-director of the Washington office of Consumers Union. "It should result in price reductions for consumers by allowing struggling long-distance carriers to offer a variety of local service options."

Under the decision, the prices Verizon charges competitors to lease network access will fall as